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Attorney for Plaintiff, C.S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

C.S., by and through his Conservator,
MARY STRUBLE, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
EDUCATION, a State Agency,
Defendant.

) CASE NO.: 08 CV 0226 W (AJB)
)
) DECLARATION OF ELLEN DOWD,
) ESQ. IN SUPPORT OF TEMPORARY
) RESTRAINING ORDER

) Date: To Be Set
) Time: To Be Set
) Judge: Hon. Thomas J. Whelan

I, Ellen Dowd, declare as follows:

1. I am an attorney admitted and in good standing in all of the state and federal Courts in the State of California, including this honorable court.

2. I am attorney of record for Plaintiff herein, and make this declaration on behalf of Plaintiff, and all others similarly situated, meanings disabled students and their parents who have, through a special education due process hearing before OAH's ALJs, obtained less than complete relief sought, in support of a Temporary Restraining Order (TRO), enjoining Defendant, "CDE" from renewing, awarding

1 or otherwise contracting the Interagency Agreement for the provision of special
2 education mediations and due process hearings for the term July 1, 2008-June 30,
3 2011 with OAH.

4 3. I have personal knowledge of the facts stated herein, and, if called as a
5 witness, I could and would testify competently thereto.

6 4. I have been practicing law for 25 years, and am also admitted and in
7 good standing in the state and federal courts in New York and New Jersey. I have
8 had extensive civil litigation experience, including complex commercial litigation
9 and Civil RICO. Since approximately 2001, I have concentrated my practice to
10 representing students in special education mediations and due process hearings in
11 California.

12 5. In 2001 until July 1, 2005, special education due process hearings
13 were conducted by Special Education Hearing Office (SEHO) of the McGeorge
14 School of Law. Decisions by SEHO averaged about 50% completely in favor of
15 students.

16 6. As a parent of my own special education student, I am acutely aware
17 of the worry, frustration, guilt and expenditure of time and money attempting to get
18 an appropriate education for a special education student. For this reason, I have
19 chosen to take cases on a contingency, or "deferred fee" basis. SEHO published
20 my name and contact information on a list of attorneys and representatives who
21 would represent parents at no or low-cost.

22 7. SEHO used hearing officers, not administrative law judges to hear due
23 process cases. These hearing officers, as required by the Interagency Agreement,
24 were attorneys who possessed the minimum qualifications under IDEA, and while
25 not infallible, were knowledgeable in special education substantive and procedural
26 laws.

27 8. SEHO only utilized their hearing officers to issue Orders and hear due
28 process cases and issue Decisions. The hearing officers did not conduct

1 mediations. Mediations were sub-contracted to an eclectic, endearing group of
2 individuals, including former teachers, administrators, school principals, as well as
3 attorneys. These mediators treated parents with compassion, respect and
4 professionalism. Most cases settled at mediation, to parents' and districts'
5 satisfaction.

6 9. OAH uses their ALJs for the dual purpose of acting as mediators, as
7 well as hearing officers. This has been problematic for a number of reasons. First,
8 the ALJs are not qualified and knowledgeable in special education law, which
9 impedes their ability be strategic in mediations. Far fewer of the cases in which I
10 am representing students are settling as a result. Obviously, the ALJ who acted as
11 mediator cannot hear the case. Additionally, as the settlements decrease, the
12 number of due process hearings increase, and OAH does not have enough ALJs to
13 hear all of the cases.

14 10. A further problem exists due to *pro tem* OAH ALJs who act only as
15 mediators, who are also untrained and are biased against parents. In a mediation
16 earlier this year, one *pro tem* told my client that "she doesn't believe in using
17 public funds for non-public school placement."

18 11. Prior to July, 2005, most cases settled either at mediation, or on the
19 first day of hearing. Since July, 2005, and particularly since January 1, 2006, more
20 and more school districts are willing to forgo mediation and take their chances at
21 hearing because (1) the ALJs don't know the law and are easily misled by the
22 Districts, and (2) even though parents cannot violate IDEA, as it was enacted only
23 to obligate school districts, the ALJs look for excuses to blame parents for the
24 district's violations, such as parent prevented the district from: holding an IEP,
25 conducting assessments, providing information from the non-public school,
26 providing district with a summary from the child's doctor, psychologist,
27 psychiatrist instead of providing the district lay personnel with private medical
28 charts and notes which are privileged and protected by HIPPA, California

1 Constitution, Article I, Section 1, and California Welfare & Institutions Code.
2 (See, Ex. 2 to Complaint, p. 29, paragraph 154, "Student's parents pulled Student
3 from Fallbrook High School based upon the recommendation of student's
4 psychiatrist, but they refused to allow the District to speak to the psychiatrist to
5 find out the basis for his opinion." In this case, the notes from the psychiatrist to
6 the school stated, "His current symptoms of anxiety, depression, and anger
7 outburst have been reportedly intensified at his current level of school placement,"
8 and "I last saw Student...with our crisis therapist...mother had picked up Student
9 from school in an agitated state. His current school placement is not adequate in
10 meeting Student's mental and emotional needs, subsequently, he is not learning to
11 his potential"). The basis for the opinion was clearly expressed and was admitted
12 into evidence. There was no reason to blame the parent, especially in light of the
13 defamatory remarks the district made about parent and student in that case. This is
14 bias toward the district.

15 12. Interestingly, Ex. 2 to Complaint also evidences one on the most
16 egregious and ongoing violations of IDEA by OAH's ALJs—forcing parents to
17 give the ALJ an extension for issuance of the Decision after the statutory 45-days.
18 Ex. 2 to Complaint, pp. 1-2, Fn. 1 "Because of the waiver of the resolution session
19 period, the 45-day time limit for hearing began to run the day after September 6,
20 2007 (Ed. Code § 56501.5, subd. (d)). The parties stipulated to an extension of the
21 deadline to give the ALJ sufficient time to review the evidence and written closing
22 argument of the parties." The Decision was issued on November 30, 2007. Under
23 34 C.F.R. § 300.511(c) "Either party to a hearing may request an extension from
24 the ALJ, which request shall be granted upon a showing of good cause. Any
25 extension shall extend the time for rendering a final administrative decision for a
26 period only equal to the length of the extension." There is no provision under
27 which an ALJ can request an extension on the final administrative decision,
28 however, this is done all the time by OAH's ALJs, and parents are under duress to

1 grant the extension for fear that they will anger the ALJ, and this will cause them
2 to lose the case.

3 13. Another very disturbing trend has arisen with regard to Districts' and
4 OAH's disregard of parents' in the due process hearing process. Under
5 CDE/OAH's official website for the publication of due process decisions,
6 www.documents.dgs.ca.gov/oah/seho_decisions between July 30, 2007 and
7 February 15, 2008, a total of 76 Decisions were published. Among these were 17
8 Decisions in which the District filed against Student, and neither student, nor
9 parents, nor a representative of parent participated in the due process hearing.
10 Parents' rights to participate on both IEP team meetings concerning their children
11 as well as to participate in due process hearings concerning the educational rights
12 of their children are provided in IDEA. Specifically, the Interagency Agreement
13 (Ex. 1 to Complaint, paragraph E. (6)), states "OAH will update and provide an
14 attorney and advocate list to parties (as required by law) and the public." California
15 Education Code § 56502(h) mandates that "The Superintendent or his or her
16 designee shall provide both parties with a list of persons and organizations within
17 the geographical area that can provide free or reduced cost representation or other
18 assistance in preparing for the due process hearing." SEHO routinely updated and
19 mailed the list to parents who were involved in due process hearings. As seen in
20 the accompanying Declaration of Tania Whiteleather, Esq. until very recently, no
21 updates to this list were made by OAH. Therefore, representatives who are
22 currently deceased have remained on the list. Furthermore, the list is not mailed,
23 but only available on the CDE/OAH website, which prohibits parents without
24 Internet access from obtaining the list.

25 14. The result of this failure of OAH and CDE is that between July 30,
26 2007 and February 15, 2008, in 17 cases that were filed by school districts against
27 students, the parents were either unable to find representation, or were intimidated
28 by the district, and did not appear at the due process hearing. The district prevailed

1 in each and every one of these due process hearings. In only 3 hearings was any
2 attempt made by the school district or OAH to contact parent to determine why
3 they were not appearing. The following are the case numbers and details about
4 these 17 publicly-available due process Decisions:

5 (1) Capistrano Unified School District v. Student/ N2007110456:

6 "There was no appearance at the hearing by Student or anyone representing
7 Student." "District prevailed on all issues."

8 (2) Alameda Unified School District v. Student/ N2007100793:

9 "No one appeared on behalf of Student. Student's mother and father (collectively
10 referred to as Parents) represented Student's interests prior to hearing but did not
11 appear at hearing or participate in the hearing." "District prevailed on issues for
12 hearing in this case."

13 (3) Lancaster Elementary School District v. Student/ N2007100553:

14 "No one made an appearance on behalf of Student at the hearing." "District
15 prevailed on the issues for hearing in this case."

16 (4) Ocean View School District and West Orange County Consortium for
17 Special Education v. Student/ N2007090177:

18 "No one made an appearance on behalf of Student at the hearing." "The District
19 was the prevailing party."

20 (5) Student v. Capistrano Unified School District/Capistrano Unified
21 School District v. Student/ N2007070429 and N200707100654:

22 "Parents were present and represented Student on the first day of hearing. On the
23 second day of hearing no one appeared on behalf of Student. Father left a
24 voicemail for the District Legal Specialist stating that parents would not be
25 attending the hearing. Father did not offer any explanation of parents' decision not
26 to attend, and did not request a continuance of the hearing." "The District prevailed
27 on all issues."

28 (6) Bellflower Unified School District v. Student/ N2007080171:

1 “No one appeared on behalf of Student. Student’s mother and father (Parents)
2 have represented Student’s interests in this case prior to hearing, but were not
3 present at the hearing.” “District prevailed on both issues for hearing in this case.”

4 (7) Lancaster Elementary School District v. Student/ N2007100553:
5 “No one made an appearance on behalf of Student at the hearing.” Fn. 1, “Parents
6 were not given notice of the closing brief deadline and the District’s time waiver.”
7 “District prevailed on the issues or hearing in this case.”

8 (8) Ripon Unified School District v. Student/ N2007050230:
9 “No one appeared on behalf of Student.” “District prevailed on the sole issue for
10 hearing in this case.”

11 (9) Chula Vista Elementary School District v. Student/ N2007040557:
12 “Student’s representative, her mother, was properly noticed of the date, time and
13 place of the hearing and she failed to appear.” “In the present case the District
14 prevailed on all issues.”

15 (10) Beverly Hills Unified School District v. Student/ N2007030833:
16 “No appearance was made by or on behalf of Student or his parents (Parents) and
17 neither Student nor Parents appeared, testified or presented any evidence.”
18 “District prevailed on the only issue that was heard and decided in this matter.”

19 (11) North Monterey County Unified School District v. Student/
20 N2007030718:

21 “No appearance was made by or on behalf of Student or his parents. Neither
22 Student nor his parents appeared, testified or presented any evidence.” “District
23 prevailed on all issues.”

24 (12) Los Angeles Unified School District v. Student/ N2007030652:
25 “No appearance was made by or on behalf of Student or his mother (Parent) and
26 neither Student nor his Parent appeared, testified, or presented any evidence.” Fn.
27 1, “See Procedural Matters, below regarding Student’s request for continuance of
28

1 the hearing.” “Parent’s request for continuance was denied.” “Los Angeles
2 Unified School District prevailed on the only issue for hearing in this case.”

3 (13) Poway Unified School District v. Student/ N2007030218:

4 “There was no appearance by or on behalf of Respondent (Student).” “The District
5 prevailed on all issues.”

6 (14) San Diego Unified School District v. Student/ N2007030059:

7 “No appearance was made on behalf of Student.” “Here, the District was the
8 prevailing party on all issues presented.”

9 (15) Los Angeles Unified School District v. Student/ N2007020239:

10 “No appearance was made by or on behalf of Student or his mother (Parent) and
11 neither Student nor his Parent appeared, testified, or presented any evidence.” Fn.
12 1, “See Procedural Matters, below regarding Student’s request for continuance of
13 the hearing.” “Parent’s request for continuance was denied.” “Los Angeles
14 Unified School District prevailed on the only issue for hearing in this case.”

15 (16) Lancaster Elementary School District v. Student/ N2007020304:

16 “Respondent Student did not appear for the hearing. Victoria Boca of the
17 Foundation for Mexican American Services has appeared as an advocate for
18 Student in this case, but did not appear for the hearing. No parent or other
19 representative for Student appeared for the hearing.” “District prevailed on the
20 single issue heard and decided.”

21 (17) Lancaster School District v. Student/ N2007020068:

22 “Respondent Student was not represented at the hearing nor did Student’s parent
23 (mother) appear on Student’s behalf.” “The District prevailed on all issues.”

24 15. At SEHO, when a parent failed to appear at the due process hearing
25 the hearing officer routinely called the parent from the hearing to determine the
26 reason for the no-appearance, and to see if the parent needed a continuance.

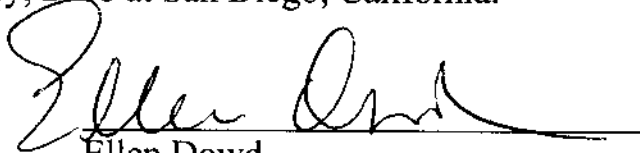
27 16. Since CDE has allowed OAH to violate and ignore the rights of
28 students and parents, even to the degree of not extending basic common courtesy

1 to students and parents, the school districts have easily manipulated the due
2 process procedure for their own self-interest, and against the legal rights of
3 Students.

4 17. Unless CDE is restrained from contracting with OAH for the
5 upcoming Interagency Agreement there is an imminent threat that Plaintiff's and
6 other Class Member's rights will continue to be violated.

7 I declare under penalty of perjury under the laws of the United States of
8 America and the State of California that the foregoing is true and correct.

9 Executed this 19th day of February, 2008 at San Diego, California.

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11 Ellen Dowd
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